Supreme Court, U.S.
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091224 FEB 8 - 2010

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

HENRY E. EKPERIGIN, D.V.M., PH.D.,

Petitioner,

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Respondent.

On Petition For Writ of Certiorari To The United States Court of Appeals For The Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals erred in affirming the final decision of the Merit Systems Protective Board sustaining the Agency's removal action, when the removal action was based on impermissibly ambiguous performance standards and substantial changes in performance standards were applied to Dr. Ekperigin's Performance Improvement Plan (PIP)?

PARTIES TO THE PROCEEDING BEFORE THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Petitioner, Henry E. Ekperigin, appeared as petitioner in the Court of Appeals.

Respondent, United States Department of Health and Human Service, appeared as Respondent in the Court of Appeals.

TABLE OF CONTENTS

CITATIONS OF OPINIONS AND ORDERS OF LOWER COURTS AND ADMINISTRATIVE AGENCIES 1

JURISDICTIONAL STATEMENT 1

CITATION OF STATUTES INVOLVED IN THIS PETITION 2

STATEMENT OF THE CASE 3

ARGUMENT 10

I. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE ISSUE NOT ADDRESSED BY THE MSPB OR THE FEDERAL CIRCUIT AS TO HOW TO INTERPRET SUBSTANTIAL AND MORE BURDENSOME CHANGES IN AGENCY PERFORMANCE STANDARDS IN A CHAPTER 43 REMOVAL ACTION 10

A. **The Performance Standards Applied to Dr. Ekperigin Were Hopelessly Ambiguous.** 10

B. **The MSPB and Federal Circuit Jurisprudence Does Not Go Far Enough to Address Substantial Changes in Performance Standards** 12

C. A Grant of Certiorari Would Aid Nearly 2 Million Federal Employees. 15

CONCLUSION 16

APPENDIX. 17

Judgment of the Court of Appeals 18

Final Decision of the MSPB. 20

Initial Decision of the MSPB 25

5 U.S.C. § 4301 46

5 U.S.C. § 4302 47

5 U.S.C. § 4303 49

4 U.S.C. § 7703 51

28 U.S.C. § 1254 54

TABLE OF AUTHORITIES

Anthony v. Dep't of Army, 27 M.S. P.R. 271 (1985) 12-13

Ekperigin v. Department of Health and Human Services,110 M.S.P.R. 306 (Nov. 14, 2008) 1

Ekperigin v. Department of Health and Human Services, Docket No. DC-0432-08-0286-I-1 (June 5, 2008 ..... 1, 14

Boggess v. Dep't of the Air Force, 31 M.S.P.R. 461 (1986). 12

Jackson v. Dep't of Veterans Affairs, 97 M.S.P.R. 13 (2004) 10

Johnson v. Department of the Interior, 87 M.S.P.R. 359, P6 (2000) 10

Wells v. Harris, 1 M.S.P.B. 199, 1 M.S.P.R. 208 (1979) 13

Wilson v. Dep't of Health & Human Services, 770 F2d. 1048 (Fed. Cir. 1985) 12, 15

STATUTES

5 U.S.C. § 4302(b)(1) 10, 13

5 U.S.C. § 4303(b)(1) 10

5 U.S.C. § 4303(e) 9

5. U.S.C. §7703(b)(1) 9

28 U.S.C. § 1254(1) 1

OTHER AUTHORITIES

bls.gov. 15

CITATIONS OF OPINIONS AND ORDERS OF LOWER COURTS AND ADMINISTRATIVE AGENCIES

The relevant opinions and orders of the court of appeals and the United States Merit Systems Protective Board are unreported but are included here in the Appendix ("App.") to the Petition. The judgment of the court of appeals stands in the Appendix at 18-19. The Final Order of the U.S. Merit System Protection in Board Ekperigin v. Department of Health and Human Services is cited as 110 M.S.P.R. 306 (Nov. 14, 2008), and stands at 20. The Initial Decision of the U.S. Merit System Protection Board in Ekperigin v. Department of Health and Human Services, Docket No. DC-0432-08-0286-I-1 (June 5, 2008) is at page 25 in the Appendix.

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Federal Circuit in Ekperigin v. Department of Health and Human Services, 2009-3099, affirming the Final Order of the U.S. Merit System Protection Board, was entered November 10, 2009. This Court has jurisdiction to review the Court of Appeals' judgment on writ of certiorari pursuant to 28 U.S.C. § 1254(1) authorizing Supreme Court review of civil judgments of United States Courts of Appeals upon grant of a petition for writ of certiorari.

CITATION OF STATUTES INVOLVED IN THIS PETITION

5 U.S.C. § 4301(2009)

5 U.S.C. § 4302 (2009)

5 U.S.C. § 4303 (2009)

5 U.S.C. § 7703 (2009)

28 U.S.C. § 1254 (2009)

STATEMENT OF THE CASE

This case arises from the January 4, 2008 removal of Petitioner, Dr. Henry E. Ekperigin, from his position as a biologist at the Department of Health and Human Services, Food and Drug Administration ("FDA"). Dr. Epkerigin is a Doctor of Veterinary Medicine who also holds a Masters degree in Veterinary Epidemiology and Preventive Veterinary Medicine from the University of California Davis, School of Veterinary Medicine, as well as a Ph.D. in Veterinary Nutrition with an emphasis in poultry nutrition, and minors in chemistry and epidemiology. Dr. Ekperigin first came to the FDA Center for Veterinary Medicine as a visiting scientist in June, 1990. Beginning in June 1991, until the time of his removal, Dr. Ekperigin worked as a microbiologist GS-13 in the FDA, which included his position on the Food Safety Team in the Division of Animal Feeds, Office of Surveillance and Compliance, Center for Veterinary Medicine, which he held at the time of his removal. Because of his microbial expertise, Dr. Ekperigin played a significant role in recent animal feed recalls involving salmonella contaminated animal feed and contaminated imported dog treats.

In 2005, Karen Ekelmen, Ph.D., Food Safety Team Leader, became Dr. Ekperigin's first-line supervisor and rating official. Sharon Benz, Chief of the Division of Animal feeds became his second-line supervisor. The Food Safety Team members generally had two types of assignments: Division of Animal Feeds ("DAF") assignments and Submission Tracking and Assignment System ("STARS") assignments.

Dr. Ekperigin's removal involved three overlapping performance plans. The first, the 2006, performance plan, which Dr. Ekperigin signed on February 3, 2006, included five critical elements: 1) Individual Work; 2) Technical Competency; 3) Teamwork; 4) Innovation and 5) Customer Service. Each element was rated on a thee-tier system: exceeds, meets or fails to meet performance measures. The ratings for the five critical elements were then averaged to arrive at a final rating, but if one or more critical element was rated "fail," the final rating must be "fails to meet performance measures." The Individual Work element had three components, leadership, manner of performance, and communication. The performance plan defined the "meets performance measures" for "manner of performance" as:

- Work products are clear and well organized
- Communicates clearly and effectively in writing
- Completes work within established deadlines
- Works independently. . .
- Follows procedures, directives, regulations, or technical orders
- *As evidence by*: work products requiring minimal revision of technical issues
- *As evidenced by*: completing at least 80% of work assignments by their due dates.

Initial Decision, App. at 15. The completion of 80% of new assignments by their due dates was a new requirement for the 2006 performance plan. However, Dr. Ekelman considered completion within

seven days of the due date to be a timely completion of assignments. Even so, the record reflects that the reviewers debated when an assignment was considered complete and Dr. Ekelman's testimony at the hearing continued to reflect ambiguity as to when assignments were considered "complete." The possibilities included when the reviewer finished his work, when Dr. Benz gave final approval, or when the secretary logged the assignment out of its applicable database.

On July 15, 2006, the Agency modified the "Individual Work" critical element of Dr. Ekperigin's 2006 performance plan by adding "completing all outstanding DAF and STARS assignments that will be 3 months or more overdue on January 1, 2007" to the manner of work component, and "attending team and division meetings on time and informing the team leader or division director in advance of the meeting if you will be unable to attend," to the "communication" component.

Dr. Ekperigin signed his 2007 performance plan on December 21, 2006. It was significantly different than the 2006 plan. First, the critical elements were rated on a four-tier system: exceptional, fully successful, minimally successful and unacceptable. The 2007 plan also included six critical elements, all of which differed from the 2006 critical elements, including 1) Coordination; 2) Animal Feeds Activities; 3) Strategic Planning; 4) Policy and Procedures Development; 5) Outreach Activities; and 6) Written and Oral Communications Activities. The plan described what was required to reach the "Fully Successful" level of each critical element and provided general definitions of the four tiers of the rating system.

For example, for the critical element of "Coordination," the "Fully Successful" standard required "Work products consistently meet deadlines determined by the supervisor, office, Center Management, and /or agency; Typically work products are complete, clear concise, thoroughly researched and documented, and reflect technical competence. "

Further, the 2007 performance plan provided general definitions of the four tires in the rating system. These definitions included:

Fully Successful (FS): "The employee met all critical elements, as described in the performance plan. . ." Examples include:

- Planned, well-organized, and complete work assignments that reflect requirements;
- Decisions . . . that demonstrate organizational awareness including knowledge of mission, function, policies. . .;
- Independently follows-up on actions and improvements that impact the immediate work unit; establishes and maintains strong relationships. . . ;
- When serving on teams and workgroups, contributions are substantive and completed according to standards; . . .

The **Minimally Successful (MS)**: rating was generally defined as the employee having difficulty meeting expectations and as the minimum level of acceptable performance for retention on the job. Improvement is necessary. Examples include:

- Occasionally fails to meet assigned deadlines;
- Work assignments occasionally require major revisions or often require minor revision;
- Application of technical knowledge . . . is not reliable;
- Occasionally fails to adhere to required procedure, instructions, and/or formats . . . ;
- Occasionally fails to adapt to changes in priorities . . .; and/or
- The employee's impact on program performance, productivity, organization effectiveness . . . need improvement.

In addition, **Unacceptable (U)** was defined as: "the employee failed to meet expectations. Immediate improvement is essential for job retention." Examples include:

- Consistently fails to meet assigned deadlines;
- Work assignments often require major revisions;
- Fails to apply adequate knowledge to completion to work assignments;
- Frequently fails to adhere to . . . procedures, instruction . . . ;
- Frequently fails to adapt to changes in priorities, procedures, or program direction.

After her initial determination that Dr. Ekperigin met his 2006 performance measures, on February 16, 2007, Dr. Ekelman, claiming that she had made an error, issued an amended appraisal to Dr. Ekperigin on the 2006 performance plan. There,

she determined that Dr. Ekperigin failed to meet performance measurements for 2006. At this point, she issued a Performance Improvement Plan ("PIP"), which required that Dr. Ekperigin improve his performance to an "acceptable" level by June 15, 2007. Dr. Ekelman advised Petitioner that during the PIP he must:

1. Complete 80% or more of his pending, not overdue, assignments by their due dates.
2. Have no assignments that were more than three months overdue.
3. Follow the Division's and Team's established priority order for assignments.
4. Follow her specific instructions about the priority order for assignments, when provided.
5. Meet with her weekly to discuss progress on, problems with and barriers to assignments.
6. Inform her immediately about important issues concerning his progress on, problems with, and barriers to completion of his assignments by their due dates.

See Initial Decision, App. At 27-28.

On July 31, 2007, during his mid-year review, Dr. Ekelman informed Dr. Ekperigin that he had failed the PIP. On October 18, 2007, the Agency issued a Proposal to remove Dr. Ekperigin for "unacceptable performance," stating that Dr. Ekperigin's "performance did not reach an acceptable

level for the critical element individual work," though the Agency admits that "individual work" was not a critical element in Dr. Ekperigin's 2007 performance plan.

Dr. Ekperigin replied to the proposal, but on December 20, 2007, the Agency issued a decision to remove him. He was removed from his position on January 4, 2008. On February 4, 2008, Dr. Ekperigin filed an appeal from the decision of the agency to remove him for performance-based reasons to the Merit Systems Protection Board ("MSPB" or "Board"). The Board had jurisdiction pursuant to 5 U.S.C. § 4303(e). The Initial Decision issued June 5, 2008, sustained the Agency's action. Dr. Ekperigin filed a timely petition for review with the Board. The Board denied the petition and its Initial Decision became final on November 14, 2008. Dr. Ekperigin filed a timely petition to the United States Court of Appeals for the Federal Circuit to review the Final Decision of the MSPB. The Court of Appeals had jurisdiction pursuant to 5. U.S.C. §7703(b)(1) and 28 U.S.C. § 1295(a)(9). The decision of the Court of Appeals affirming the Final Decision of the MSPB was entered on November 10, 2009.

ARGUMENT

I. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE ISSUE NOT ADDRESSED BY THE MSPB OR THE FEDERAL CIRCUIT AS TO HOW TO INTERPRET SUBSTANTIAL AND MORE BURDENSOME CHANGES IN AGENCY PERFORMANCE STANDARDS IN A CHAPTER 43 REMOVAL ACTION.

A. The Performance Standards Applied to Dr. Ekperigin Were Hopelessly Ambiguous.

In an Agency's action to remove an employee for performance based reasons pursuant to section 4303 of Chapter 43, an agency must show that the appellant's performance standards meet the requirements of 5 U.S.C. § 4302(b)(1). Jackson v. Dep't of Veterans Affairs, 97 M.S.P.R. 13, 16 (2004) (citing Johnson v. Department of the Interior, *87 M.S.P.R. 359, P6 (2000)*). Thus, the agency must establish performance standards that will, to the maximum extent feasible, permit the accurate evaluation of job performance on the basis of objective criteria related to the job. 5 U.S.C. § 4303(b)(1). Further, before an employee is removed, he must be given a reasonable opportunity to improve. Id.

In this case, the performance standards issued by Dr. Ekelman, Dr. Ekperigin's first-line supervisor, lacked the required objectivity because they were always changing and ill-defined. First, in 2006, the requirement of completing 80% of new assignments within seven days of their due dates was added.

Then, mid-year, Dr. Ekelman added three more requirements to the 2006 performance plan, including the requirement that Dr. Ekperigin complete all assignments older than 3 months by the January 1, 2007.

Further, In December 2006, Dr. Ekelman declared that Dr. Ekperigin met 2006 performance measures, but gave him an entirely new performance plan for 2007. The 2007 plan had six new critical elements, none in common with the 2006 plan, and also contained a new four-tier rating system which included a "minimally successful" rating. Finally, in February 2007, Dr. Ekelman changed her 2006 appraisal of Dr. Ekperigin to "fails" to meet performance measures and issued a PIP. The PIP had none of the elements of Petitioner's 2007 performance plan. It did, however, include the 80% completion requirement, but eliminated the 7-day grace period.

Finally, and most egregiously, throughout 2006 and 2007, not Dr. Ekperigin, Dr. Ekelman, or any reviewer working on DAF and STARS assignments, had any idea what constituted a "complete" assignment: when the reviewer finished his work, when Dr. Benz gave final approval, or when the secretary logged the assignment out of its database. Notably, the two latter choices were beyond the control of the reviewer.

This ambiguity remained even before the Court of Appeals. Even considering the so-called "objective" standards, the Petitioner and the Agency were unable to agree on the percentage of assignments Dr. Ekperigin completed during his PIP. Petitioner calculated that he completed the required 80% of the assignments during the PIP. The confusion lay in what constituted completion. At least

one assignment upon which Dr. Ekperigin completed his work during the PIP was deemed by the Agency not to be complete, because it was not signed out of the database until two days after the end of PIP. In short, the Agency's ambiguous standard for what constituted a "completed" assignment failed to give Petitioner proper notice of performance standards and the opportunity to improve performance.

B. The MSPB and Federal Circuit Jurisprudence Does Not Go Far Enough to Address Substantial Changes in Performance Standards.

The MSPB has addressed the issue of whether substantial changes in performance standards can constitute sufficiently objective standards and the requisite opportunity to improve. In Boggess v. Dep't of the Air Force, 31 M.S.P.R. 461, 463 (1986), the Board reversed the agency's removal of the employee where the agency gave the employee substantially different performance standards and only allowed him 30 days to improve. There, the Board held that, when the new standards differed substantially from the previous standards, the employee was entitled to an appraisal period under the new standards and--if his performance was rated unacceptable under those standards--to a subsequent PIP. It also found, in that case, that the action against the employee could not be sustained because the employee's standards were substantially changed at the beginning of his PIP. Id. at 462-67. See also Anthony v. Dep't of Army, 27 M.S. P.R. 271, 273 (1985) (changes in appellant's performance standards were permissible because they neither materially changed the performance

expected nor posed any additional burden on appellant).

In this case, Dr. Ekperigin was subjected to a continuously shifting muddle of performance standards. The record indicates that his standards were materially changed in February 2006, July 2006, December 2006, and February 2007. At each point, the standards became more burdensome and changed substantially from prior standards within the same performance evaluation period. Moreover, never during the entire 18 month period at issue, was it clearly defined, what constituted a "complete" STARS or DAF assignment. The repeated changes to Dr. Ekperigin's performance standards, along with the ambiguity surrounding completion, led to precisely the arbitrariness that the statute was intended to avoid. Wilson v. Dep't of Health & Human Services, 770 F2d. 1048, 1051 (Fed. Cir. 1985 (quoting Wells v. Harris, 1 M.S.P.B. 199, 1 M.S.P.R. 208, 233 (1979) ("'the use of objective criteria in performance appraisals, consistently applied, will benefit Federal employees by providing them with protection against arbitrariness and discrimination'")).

In Wilson, the Court of Appeals for the Federal Circuit specifically set out to address the novel question: "what did Congress mean in 5 U.S.C. § 4302(b)(1) when it required that performance standards contain 'objective' evaluation criteria permitting 'accurate' job evaluation 'to the maximum extent feasible'" and what is "the proper measure by which the MSPB and the court are to judge the sufficiency of contested standards." 770 F2d. at 1050. Despite this, neither the Board nor the Court of Appeals has addressed here, or previously, whether

repeated changes in performance standards, such as are presented in the instant case, can be sufficiently objective to satisfy the statute.

The fact that the Board is lacking guidance on this issue is plain from the Initial Decision. Indeed, in order to decide as she did, the Administrative Judge decided to deliberately ignore Dr. Ekperigin's substantially changed 2007 performance plan. She wrote:

> Because the agency's appraisal system did not include a 'minimally successful' rating level, the appellant could be required to reach the 'meets' level during the PIP. No basis for changing this conclusion is provided by the fact that appellant's 2007 performance plan did provide for four rating levels including 'minimally successful.'

Initial Decision, App. at 33.

Not only does the Initial Decision admittedly provide no basis for ignoring the 2007 performance criteria, which were issued two full months before the PIP, it provides no basis for ignoring the fact that the PIP imposed a greater burden on Dr. Ekperigin than the 2006 performance plan by requiring completion on the due date rather within seven days of the due date. Moreover, the AJ while acknowledging the ambiguity surrounding what constituted "complete" DAF or STARS assignments, again chose to ignore it without legal or factual justification.

This Court should grant certiorari to fill in the hole in Federal Circuit and MSPB jurisprudence that allowed such an erroneous result. Neither the Board nor the Federal Circuit has yet gone far enough in

defining what constitutes impermissible ambiguity under 5 U.S.C. § 4302, against the backdrop of Agency flexibility that the statute was admittedly intended to provide.

C. A Grant of Certiorari Would Aid Nearly 2 Million Federal Employees.

The federal government is the nation's largest employer with 1,909,000 civilian employees at the end of 2008, excluding the Postal Service, according to The Bureau of Labor Statistics. See bls.gov. The Merit System Protection Board was devised to ensure uniformity in the application of the law in matters related to federal employment. This is what Congress intended when it sought to protect the livelihoods of more than a million federal employees, as well as the efficient functioning of the federal government, from the arbitrariness of imprecise performance standards.

As the Court of Appeals has stated, "[a] parallel way of putting the same Congressional objectives is that a standard should be sufficiently precise and specific as to invoke a general consensus as to its meaning and content." Wilson, 770 F.2d at 1052. The record in this case amply demonstrates that there was no general consensus, nor could there be, as to the meaning and content of the myriad of performance standards applied to Dr. Ekperigin. In order to correct this error that could frequently recur, affecting masses of federal employees and the efficient operation of the government itself, this Court should grant this petition for certiorari.

CONCLUSION

For all the foregoing reasons, Petitioner, Henry E. Ekperigin, D.V.M., Ph.D., respectfully requests this honorable Court to grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

Respectfully Submitted,

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